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ABSTRACT

The author points out that although parents have the right to due process as mandated by P.L. 94-142 (the Education for All Handicapped Children Act), the schools have the advantage over parents in terms of time, money, resources, and determination. Findings from a national survey of due process hearings included that hearings are requested for three basic reasons (appropriate program, appropriate placement, and appropriate evaluation); that there are 970 certified hearing officers with a range of 141 in South Caroline to 0 in Nevada: and that the appeals of decisions and noncompliance rate is only 13% of all decisions rendered. Among conclusions were that the expected numbers of due process hearings has failed to materialize: those requesting hearings are among the upper and middle class or have attained assistance from the State Developmental Disability Advocacy Agency: and minorities, the poor, and poor minorities are continuing to receive a second rate educational program, if any. It is proposed that professional organizations assume an activist child advocate position. (SB)

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Due Process: A Right For Some But Not For All

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Due Process: A Right For Some But Not For All

Background

In 1975, the United States Supreme Court rendered two decisions (Cross v. Lopez; Wood v. Strickland) that added credence to the mandate that public education officials must abide by established due process in providing an educational program to school aged children. The precedence for the use of due process procedures with handicapped school aged children was established by the PARC (Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania, 1971), Chapter 776, Commonwealth of Massachusetts (1975), Public Law 93-380 (1974) and Public Law 94-142 (1975). Public Law 94-142, the Education for All Handicapped Children Act, has been labelled as the Bill of Rights for Handicapped Students.

Public Law 94-142 describes an "Impartial due process hearing" as:

(a) A parent or a public educational agency may initiate a hearing on any of the matters described section 121a. 504 (a) (1) and (2).
(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.
(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:
    (1) The parent requests the information; or
    (2) The parent or agency initiates a hearing under this section (FR, 42, 163, Section 121a. 506, p. 42495).

The first formal step in the initiation of a due process hearing is to notify the home school officials (Local Education Agency) and the State Director of Special Education or Exceptional Children by registered mail that you are requesting a due process hearing on your child's educational program. The letter should contain, as simply written as possible, the nature of the complaint, name persons involved in any educational decisions affecting your child, and/or the educational services desired. All correspondence should be sent by registered mail with return receipt because upon their receipt by the L. E. A. a 45 day time limit is set into sequence.

The second step is the scheduling of the due process hearing at a time and place suitable to the parents. The hearing must be held with impartial hearing officer(s) in charge of the hearing. Upon completion of the hearing, the hearing officer(s) have 45 days to render their decision in writing to the parents, L. E. A., and State Director of Special Education's appointed Due Process Section Director.

The Rules and Regulations (FR, 42, 163) published on August 23, 1977, outlined procedural safeguards to protect and insure the handicapped student, their parents, their amicus, and/or their lawyer access to a free and appropriate public education. These procedural safeguards include:

1. The right to have a due process hearing before an impartial hearing officer within 45 days of the initial request;
2. The right to present evidence and witnesses that support their position;
3. The right to be advised and accompanied by counsel and individuals with special knowledge or training with respect to the problems of handicapped children;
4. The right to cross-examine witnesses and compel their attendance;
5. The right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 days before the hearing;
6. The right to obtain a written or electronic verbatim record of the hearing;
7. The right to have the child, who is subject of the hearing, present; and
8. The right to have the hearing open to the public (42, FR, 163).

One important step that precedes the due process hearing has been omitted, the step of mediation. Mediation is included in the comments section of 42, FR, 163. It has been reported to be a successful intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by statute or the PL 94-142 regulations, it was suggested as a method for settling hearing requests. Mediation brings both sides together with an impartial mediator to discuss the problems that exist. If resolution of the due process request can be obtained then, the request for a hearing is cancelled.

Advantage for the Schools

Meyen (1978) reported many public school administrators and regular educators had difficulty understanding the practical implications of PL 94-142, as well as, the reasons for its inclusion into federal law. The professional educators thought schools were doing an adequate job of educating children. Special education administrators, school superintendents, and union leaders (NEA and AFT) reported in their professional journals, newsletters, magazines, newspaper articles and popular magazines announcing that PL 94-142 would bankrupt public supported education. Additional scare tactics were used by warning regular classroom teachers they would be required to change diapers, feed children their meals, take severely retarded children to the bathroom, teach academics to profoundly handicapped children, and include physically limited children in their gym classes. In addition, teachers were informed that due process hearings would allow the parents to call for an expensive hearing anytime the schools failed to meet their every whim. A study by Zimmerman and Robertson (1980) found this to be false.

Who has the advantage in a due process hearing?

Is the advantage with the parents or the schools? Silberberg (1979) charged that "Schools Have Home Court Advantage" in AMICUS. He reported that PL 94-142 does make it possible for parents to contest the school administration's actions but yet the parents continue to function at a disadvantage. The schools have the time, money, resources, and determination on its side; the parents, with limited funds and few or no resources, have an urgent need to obtain an appropriate educational program for their child. Silberberg further illustrates his position with these findings:

1. Proper preparation is the key to winning any case. School systems have a well-qualified staff of administrators and other experts who can assist in justifying the system's decision. Unless parents reside in a large urban area, most of the local experts have been preempted by the school system. The parents are less

likely to bring in independent experts for "live testimony".

2. The school system will have its staff prepare copies of educational records. The parents must do this or pay someone to have it done. Although duplication costs are nominal, in an involved case this may be more than poor parents can afford.
3. In the hearing, parents must be capable of presenting alternatives to the schools proposed program. The parents must locate educational experts to assist in their search for these alternatives. This can be an expensive process. Parents testimony is usually discounted, as they are not "established experts". The school has its staff available at no cost.
4. The school system has the option and the financial resources to be represented by a competent counsel. The parents, on the other hand, must either provide their own attorney or attempt to obtain free legal services. An appeal of local decisions or state decisions to a higher authority will necessitate the preparation of a transcript. The costs of the transcripts, if not provided by the school system, can be quite expensive in an involved case where there is testimony from many witnesses.
5. If the parents are successful, the victory may not have any long-term meaning. For example, where parents have sought private placement for their handicapped child and won, the placement is subject to review each year.
6. Finally, the parents have no guarantee that the school's paper plan will be equally effective or even put into operation for their handicapped child. Parents have learned that agreed upon educational prescriptions were, to their dismay, not implemented in their child's classroom (1979, 89-90).

Many families have suffered severe financial setbacks in attempts to obtain a free and appropriate educational program. Wives have gone to work and husbands have taken on second jobs to pay for expert legal advice. Thus, in reality a due process hearing is still to the advantage of the public schools. If the parents are poor, black, red, non-English speaking, or a combination thereof, then they start with two strikes against them.

Results of National Survey

Zimmerman and Robertson (1980) collected a national survey of due process hearings. Over three-fourths of the questionnaires were returned. The findings were:

1. The expected deluge of hearings totaled 1,494 with Pennsylvania's 421 the largest. Guam and Nevada reported no hearings were held.
2. Parents initiated 93% of all hearings requested and the schools initiated 7% of hearings requested.
3. Hearings were requested for three basic reasons. These were:

appropriate program (47%), appropriate placement (39%), and appropriate evaluation (14%).

4. There are 970 certified hearing officers with a range of 141 in South Carolina to 0 in Nevada. The hearing officers were professional educators (68%), lawyers (17%), parents (4%), and other interested parties (11%). Eleven states used only professional educators and six states used only lawyers as hearing officers.
5. Costs for a due process hearing ranged from a low of $100 in Idaho to $5,200 in Ohio or a national mean of $1,680 for 1,564 hearings. The agency responsible for the cost was the State Education Agency (50%), Regional Education Agency (3%), Local Education Agency (34%), and both State and Local Education Agencies sharing (13%).
6. The appeals of decisions and non-compliance rate is only 13% of all decisions rendered (Zimmerman and Robertson, 1980).

One important finding not shown in the Tables 1-3 was that 17.5% of the respondents felt that mediation was a strong point of the hearing officers training. Only the quality of the hearing officers training and the hearing officers training manual utilized (23%) were reported as more important. Thus, the expected deluge of hearings has failed to materialize as expected by the public school administrators and teachers unions.

Conclusions

Currently, the expected numbers of due process hearings has failed to materialize. Those requesting hearings are among the upper and middle class or have attained assistance from their State Developmental Disability Advocacy Agency. Minorities, the poor, and poor-minorities are continuing to receive a second-rate educational program, if any. We continue to talk with parents who have been told, "this is what we have to offer, take it or leave us alone". Mothers, in middle class families, who have filed due process requests, have found themselves returning to work to afford the costs of a qualified lawyer. The lawyers fees have ranged from $35 to $75 for a half-hour. The parents will have to spend at least $1,000 on a hearing for lawyer fees. How can the poor or minority parent afford this cost unless they qualify for assistance from the Development Disabilities advocate?

TABLE I

DUE PROCESS HEARINGS

STATE	SOURCE OF HEARING School/Parents		Eval.	REASONS Place	Prog.	HEARING OFFICERS	AVERAGE COSTS	APPEALS OR NON-COMPLIANCE	BEARER OF COST
AL	1/1	26/26	1	12	14	35	$1,200	9	SEA
AK	3/1	1/1	1	1	0	2	NR	1	SEA
AR	5/1	9/1	1	0	1	5	$ 750	0	SEA
CO	0	3/3	0	1	2	20	$ 400	0	SEA
CT	5/3	180/137	40	40	60	6	$1,000	7	SEA
DE	0	55/55	0	55	0	60	NR	0	LEA
DC	1/1	120/48	3	0	45	7	$ 175	6	LEA
FL	3/3	21/21	0	2	22	12	$2,000	0	LEA
GA	1/1	14/9	1	8	2	21	$ 500	3	SEA
GUAM	1/0	12/0	0	0	0	2	NR	0	DEPT. OF ED.
ID	1/1	4/4	0	2	3	2	$ 100	0	SEA
IL	50/50	250/250	50	75	175	85	$3,000	6	LEA/SEA SHARE
IA	5/1	23/8	0	5	4	6	NR	0	SEA
KY	0	23/12	1	7	4	27	$ 500	2	LEA
LA	0	50/40	NR	NR	NR	50	$ 400	0	SEA
ME	2/2	16/6	2	5	1	7	$ 300	2	LEA?SEA SHARE
MD	0	148/63	NA	NA	NA	31	$ 550	10	SEA
MI	0	49/46	10	6	30	NA	$2,750	3	SEA

TABLE II

DUE PROCESS HEARINGS

STATE	SOURCE OF HEARING School/Parents		Eval.	REASONS Place	Prog.	HEARING OFFICERS	AVERAGE COSTS	APPEALS OR NON-COMPLIANCE	BEARER OF COST
MS	0	18/18	NR	NR	NR	9	$1,000	0	LEA
NE	0	13/13	1	12	0	2	$1,000	2	SEA
NV	0	4/0	0	0	0	0	NR	0	NA
NJ	25/9	106/41	10	20	20	4	$ 500	0	LEA
NY	127 Held		NR	NR	NR	135	$1,350	26	LEA
NC	NA/1	NA/10	NR	NR	NR	70	NR	9	LEA
ND	1/1	10/6	0	4	4	2	$ 800	0	SEA
OH	0	NA/7	0	7	0	7	$5,250	0	LEA
OK	2/1	37/9	1	4	7	25	$ 400	2	LEA
OR	0	20/8	0	8	0	13	$3,500	1	LEA
PA	421 Held		NR	NR	NR	65	$2,000	NR	REA
Puerto Rico	7/1	24/1	0	2	0	7	NR	0	SEA
SC	NA/1	NA/8	0	0	9	141	NR	8	LEA
SD	3/3	10/5	1	6	1	8	$1,000	0	LEA/SEA SHARE
TN	0	450/90	0	70	20	9	$ 800	12	LEA/SEA SHARE
UT	NA/2	NA/2	0	0	2	50	NR	0	LEA
VT	20/10	20/10	1	5	4	2	$ 300	0	SEA
VA	0	NA/38	0	0	0	NR	$ 700	NA	LEA/SEA
WA	NA	NA	NR	NR	NR	15	$1,500	6	LEA
WV	NA/1	NA/4	NR	NR	NR	26	$1,200	6	LEA

TABLE III

DUE PROCESS HEARINGS

STATE	SOURCE OF HEARING SCHOOL/PARENT	EVAL.	HEARING STAFF	HEARING OFFICERS	AVERAGE COSTS	APPEALS OR NON-COMPLIANCE	HEARER OF APPEAL
VT	0 NA/13	NR	NR	NR	$3,000	3	LEA
TOTAL	138/9 1717/807 578	124	351	434	870	$1,680 ($1,584)	123

NA Not Available

NR Not Reported

(Zimmerman and Robertson, 1980)

Secondly, since the schools have all of the advantages (Silberberg, 1978) in a due process hearing, maybe it is time for the professionals to stand up and be counted. Advocacy is a term that the Council for Exceptional Children (CEC), American Association on Mental Deficiency (AAMD), National Association for Retarded Persons (NARC), Association for Children with Learning Disabilities (ACLD), and other parent and professional associations can provide advice on obtaining assistance for requesting a hearing. Today, these organizations come up short when asked to provide professional assistance. If higher education professionals become more involved, then the public schools may threaten to cut off their practica/student teaching placements as well as employment for graduates. If public school administrators or employees become involved, then they are threatening their professional careers. Last, if the parents obtain services of professionals in private practice then the parent must pay that professional for his time and travel involved in preparation for a hearing and during the hearing.

What is the recommendation for these professional organizations supporting advocacy? I propose that the professional organizations (CEC, AAMD, ACLD, and others) through their membership, assume an activist child advocate position. This would require a code of ethical procedures to be followed in providing assistance in filing, developing, and carrying out a due-process hearing. It would furthermore require the provision of expert witnesses to testify in support of the parents/amicus case. Last year, AAMD refused to intercede as amicus in a life support system case in Maryland and the Down's Syndrome baby died. Can professionals continue to take this hands off position when asked to intercede in court cases involving life sustaining systems? If these professionals continue to take a hands-off position, will not the implementation of PL 94-142 soon be discontinued? Lest we forget Nazi Germany. If help is not provided to parents, then due process will become "a right for wrong, but

ly those that can afford it". The final

these professional organizations.

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